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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847, 96-50948 and 96-10818

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in conflict with prior decisions of this Court and other Circuits, and in violation of Section 36 of the National Bank Act and the doctrine of competitive equality embodied therein, the Fifth Circuit erred by allowing the Comptroller of the Currency to imply the authority to retain branches, thereby nullifying the decision of the State of Texas to prohibit interstate branch banking.

2. Whether the Fifth Circuit's failure to consider congressional intent, as revealed in the plain language and legislative history of Section 36 of the National Bank Act, confers impermissibly broad authority on the Comptroller in violation of the constitutional framework of separation of powers and considerations of federalism.

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PETITION FOR A WRIT OF CERTIORARI

Catherine A. Ghiglieri, in her official capacity as Texas Banking Commissioner ("Petitioner"), requests that a writ of certiorari issue to review the judgments of the Fifth Circuit Court of Appeals in these cases.

OPINIONS BELOW

The opinion of the Court of Appeals in *Ghiglieri v. Sun World, N.A.* is reported at 117 F.3d 309 (5th Cir. 1997) (Petitioner's Appendix ("Pet. App.") A). The opinion of the district court is reported at 942 F. Supp. 1111 (W.D. Tex. 1996) (Pet. App. C).

The opinion of the Court of Appeals in *Ghiglieri v. Ludwig* is reported at 125 F.3d 941 (5th Cir. 1997) (Pet. App. B). The opinion of the district court is not reported (Pet. App. D).

JURISDICTION

The judgment of the Court of Appeals in *Ghiglieri v. Sun World* was entered on July 22, 1997, and the Petition for Rehearing and the Suggestion for Rehearing En Banc were denied on September 25, 1997 (Pet. App. G). The Court of Appeals entered its judgment in *Ghiglieri v. Ludwig* on October 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article III, United States Constitution, provides as follows:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATUTORY PROVISIONS INVOLVED

A. Section 30 of Title 12, United States Code, provides in pertinent part:

> **(b) Location change**
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.
>
> **(c) Coordination with section 36 of this title**
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

B. Section 36 of Title 12, United States Code, provides in pertinent part:

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

The full text of § 36 is set forth at Pet. App. H.

C. Section 81 of Title 12, United States Code, provides:

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

D. Section 702 of Title 5, United States Code, provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .

E. Section 703 of Title 5, United States Code, provides in pertinent part:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter

in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

F. Section 704 of Title 5, United States Code, provides in pertinent part:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

G. Section 1331 of Title 28 United States code, provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

H. Section 2201(a) of Title 28 United States Code, provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

I. Article 342-903, Texas Revised Civil Statutes (repealed effective Sept. 1, 1995 by Act of June 16, 1995, 74th Leg., R.S., ch. 914, § 26(1)), provided in pertinent part:

> Sec. 1. (c) Branch offices may be established anywhere in the state on prior written approval of the Banking Commissioner. . . .

J. Act of May 9, 1995, 74th Leg., R.S., ch. 58 (effective Aug. 28, 1995) (now codified at TEX. FIN. CODE ANN. § 32.0095 (Vernon Supp. 1998)), provides in pertinent part:

> SECTION 2. INTERSTATE MERGERS AND BRANCHES PROHIBITED. Notwithstanding any other law:
>
> (1) [merger provision omitted]
>
> (2) an out-of-state bank may not establish a de novo branch in this state or acquire a branch in this state by purchase or other means; and
>
> (3) a domestic bank may not establish a de novo branch in a state other than this state or acquire a branch in a state other than this state by purchase or other means.

K. ARK. CODE ANN. § 23-32-1202 (Michie 1994) is set forth at Pet. App. I.

L. N.M. STAT. ANN. §§ 58-1C-4, 58-1C-5, 59-1C-6, 58-1C-7, 58-1C-8 (1996) is set forth at Pet. App. J.

STATEMENT OF THE CASE

Historical Overview of Legislative Scheme. This petition addresses two decisions of the Comptroller of the Currency ("Comptroller") permitting national banks to relocate across Texas state lines and retain branches in the original host states — despite the fact that federal law prohibits the Comptroller's decisions. By permitting the retention of interstate branch banks after Sun World, N.A. ("Sun World") and Commercial National Bank ("CNB") moved their main offices across Texas state lines, the Comptroller has accomplished through administrative fiat what he could not secure through congressional enactments.

As initially enacted, the National Bank Act did not confer branching power upon national banks.[1] At that time, in contrast, some state banks already had branching powers. When, in the early years of this century, the Comptroller tried to approve branching by national banks, this Court held emphatically that the authority to branch could not be implied under the National Bank Act.[2] Therefore, in order to equalize branching authority between state and national banks, in 1927 Congress enacted the McFadden Act.[3] That amendment to Section 36 of the National Bank Act

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[1] Congress enacted the National Bank Act in the Act of June 3, 1864, Ch. 106, 13 Stat. 99. In 1865, Congress passed a law (now codified at 12 U.S.C. § 36(b)) allowing state banks that converted to a national charter to retain existing branches. Act of March 3, 1865, Ch. 78, § 7, 13 Stat. 469, 484. This action reflected Congress' early understanding that express statutory authority was necessary for a national bank to retain branches.

[2] *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659, 44 S. Ct. 213, 216 (1924).

[3] Act of Feb. 25, 1927, Ch. 191, § 7, 44 Stat. 1228-29.

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authorizes national banks to retain branches under limited and specified circumstances, and to establish branches to the extent permitted their state counterparts under applicable state law, thus establishing the principle of competitive equality.

> The McFadden Act was in large part a compromise in which Congress started from a general antibranching rule and created a limited exception just large enough to allow national banks to compete effectively with state banks, but also narrow enough to continue to serve the policy of exercising control on the financial power of national banks.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 410, 107 S. Ct. 750, 762 (1987) (Stevens, J., concurring). The McFadden Act thus expressly adopted state law as one key metric of the branching power of national banks.

In 1994, in contemplation of the expansion of the national branch banking system, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal") (Pet. App. K). Riegle-Neal does not abrogate the statutory principle embodied in Section 36 that, with a few exceptions not applicable here, state law controls the limits of branching by national banks. Instead, it extends that principle to the new arena of interstate branch banking. Recognizing the continued importance of state autonomy in this area, Congress reserved to each state the right to opt-out of interstate branch banking under Riegle-Neal.[4] Effective September

[4] Riegle-Neal, § 102(a)-(b), 108 Stat. at 2343-44 and 2349.

1, 1995, the Texas Legislature unanimously opted-out of interstate branch banking.[5]

Factual Background and the Opinions Below. Prior to the effective date of Texas' opt-out, CNB filed two applications with the Comptroller — one seeking to move its main office from Texarkana, Arkansas to Texarkana, Texas (a distance of less than thirty miles),[6] and the other seeking to establish its former main office as an Arkansas branch. Neither Texas nor Arkansas law allowed interstate branch banking.[7] Over the objection of the Texas Banking Commissioner ("Texas Commissioner"), the Comptroller nonetheless approved the applications, allowing CNB to relocate and establish interstate branches. The Comptroller concluded that Section 30, by implication, allowed the retention of the branches following relocation, although these branches could not be established or retained under the language of Section 36. The Texas Commissioner then filed for declaratory and injunctive relief in the United States District Court for the Northern District of Texas.

After the effective date of Texas' opt-out, Sun World filed applications to move its main office two miles from El Paso, Texas to Santa Teresa, New Mexico, and to establish its former main

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[5] Act of May 9, 1995, 74th Leg., R.S., ch. 58 (now codified at TEX. FIN. CODE ANN. § 32.0095 (Vernon Supp. 1998)).

[6] In 1886, prior to the decision in *St. Louis*, Congress added Section 30 to authorize national banks to relocate their main offices within a distance of not more than thirty miles. Act of May 1, 1886, Ch. 73, § 2, 24 Stat. 18. (Section 30 does not discuss branching.)

[7] TEX. REV. CIV. STAT. ANN. art. 342-903, § 1(c); ARK. CODE ANN. § 23-32-1202 (Pet. App. I).

office in Texas as a branch.[8] The Texas Commissioner filed an action for declaratory and injunctive relief against Sun World in the United States District Court for the Western District of Texas. When the Comptroller approved the applications, and intervened in the lawsuit, the Texas Commissioner filed an amended complaint against Sun World and the Comptroller.

Sun World, CNB (collectively the Banks"), and the Comptroller each filed motions to dismiss in the District Courts, or in the alternative, for summary judgment. In each action, the Texas Commissioner filed a cross-motion for summary judgment urging that national banks possess no implied authority to branch, either before or after Riegle-Neal.[9] The District Courts granted the Texas Commissioner's cross-motions for summary judgment and set aside the Comptroller's decisions that approved the Banks' applications. *See Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law (unreported) (Pet. App. D); *Ghiglieri v. Sun World*, 942 F. Supp. 1111 (Pet. App. C).

The Comptroller and the Banks appealed in both cases. On July 22, 1997, the Fifth Circuit reversed the District Court's decision in *Sun World*. *See* 117 F.3d 309 (Pet. App. A). In that opinion, the Fifth Circuit purported to apply this Court's test for reviewing an agency's interpretation of a statute set forth in

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[8] New Mexico permitted branching only on a reciprocal basis. *See* N.M. STAT. ANN. §§ 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996) (Pet. App. J). Because interstate branching was not permissible in Texas, New Mexico law did not authorize the Texas branches.

[9] In the actions, the Texas Commissioner challenged the Comptroller's decisions pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 703, and 704, thereby invoking the courts' federal-question jurisdiction under 28 U.S.C. § 1331 and the federal declaratory judgment statute, 28 U.S.C. § 2201(a).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). In applying the first prong of *Chevron*, the Court of Appeals concluded, without examining legislative history, that the National Bank Act is silent with regard to the retention or divestiture of branches following a relocation. The Fifth Circuit then turned to the second prong of *Chevron* and held that the Comptroller reasonably interpreted the statute to allow such retention. *See Sun World*, 117 F.3d at 314 (Pet. App. A-7).

The Texas Commissioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc, asserting that (i) the Banks have no implied authority to establish or retain interstate branches, and the assertion of such implied authority under Section 30 contravenes the doctrine of competitive equality reflected in the branching limitations of Section 36, and (ii) the appellate court's failure to consider Congress' intent, as revealed by the plain language and legislative history of Section 36, conflicts with this Court's decision in *Chevron*, and allows the Comptroller to defy legislative authority in violation of the doctrine of separation of powers. The petition for rehearing and suggestion for rehearing en banc were denied on September 25, 1997 (Pet App. G).

On October 29, 1997, the Fifth Circuit rendered its opinion in the CNB case (*Ghiglieri v. Ludwig*), relying on its *Sun World* decision to reverse the District Court. 125 F.3d 941 (Pet. App. B).

In his concurring opinion filed in the CNB case, Judge Reavley stated:

> My esteemed colleagues are in error, however, when they say that § 36 is silent with respect to

> the retention of branches after relocation of the main office. Section 36 begins: "The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:"

Ghiglieri v. Ludwig, 125 F.3d at 944 (Pet. App. B-6).

REASONS FOR GRANTING THE PETITION

This petition presents a case of agency defiance of Supreme Court precedent and a conflict among the Circuits concerning the principle of competitive equality between national and state-chartered banks. In addition, it raises important issues regarding the encroachment of agency powers on constitutionally established policies of federalism and the limits of the doctrine of deference in the face of non-compliant agency conduct. In 1994, congressional conferees directly criticized the Comptroller for improperly displacing state banking laws that should have been applicable to national banks. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53 (Aug. 2, 1994) ("During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result.") (Pet App. L-13).

The danger of agency overreaching is not new. In 1937, the President's Committee on Administrative Management cautioned that administrative agencies "constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible

agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.08, at 24 (3d ed. 1972). More recently, a federal court has observed that it has "always been difficult to reconcile [the] 'headless fourth branch' with a constitutional text and tradition establishing three branches of government." *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (per curiam).

Our democratic system of government presupposes the separation of powers to guard against the danger that one governmental branch will aggrandize power at the expense of another. *Mistretta v. United States*, 488 U.S. 361, 381-82, 109 S. Ct. 647, 660 (1989). One "protection against [such] tyranny comes . . . from our system of judicial review of administrative action." DAVIS, ADMINISTRATIVE LAW TEXT § 1.08, at 25. The facts prompting this petition represent an erosion of that system: the Comptroller has overstepped the statutory limits of his authority, and the Court of Appeals, under a mistaken application of deference principles, has abdicated its responsibility to hold excessive administrative activism in check.

The questions presented in this petition are not academic. The Comptroller has allowed two national banks to secure branching advantages that none of their state competitors in the affected states possess. For example, Sun World — a subsidiary of the largest bank in Texas, NationsBank — will enjoy unique corporate efficiencies, escape state franchise taxes, and even avoid certain

reporting requirements that are applicable to all Texas state-chartered banks.[10]

Nor is the problem isolated. Between 1994 and June 1997, numerous branches were established nationwide using the Comptroller's flawed interpretation of Section 30. *See, e.g.*, Overview of Proposed Rule and Comments, 62 Fed. Reg. 47,729 (1997). These unlawful branches are likewise exempt from provisions of Riegle-Neal, such as deposit production restrictions.[11] Moreover, even after Riegle-Neal, many states that permit interstate branching allow it to occur primarily through mergers (rather than de novo), and still impose bank age restrictions as a precondition to such mergers.[12] The Comptroller's interpretation effectively exempts a significant number of national branching networks from these valid restrictions. The challenged interpretation thus disrupts the level playing field envisioned by Congress for the dual banking system.

The Comptroller has impressed on Texas an involuntary system of interstate branch banking despite Texas' explicit rejection of that system under both the McFadden Act and Riegle-Neal. The Comptroller's blatant disregard of the congressional scheme of competitive equality provides a compelling reason for review by this Court. Not only do the challenged decisions conflict with this

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[10] *See, e.g.*, 12 C.F.R. § 25.62(b) (effectively exempting branches established pursuant to Section 30 prior to June 1, 1997 from the loan-to-deposit ratios imposed by the deposit production rules).

[11] *See* Riegle-Neal, § 109 (Pet. App. K-52).

[12] According to the Conference of State Bank Supervisors, *Status of Interstate Branching Legislation in the States*, as of July 8, 1997, more than thirty states impose a five-year minimum age restriction on the bank acquired through merger.

Court's and other Circuits' pronouncements regarding branch banking, the decisions also illustrate the need for guidance from this Court as to the limits and proper application of the doctrine of deference.

I. NATIONAL BANKS POSSESS NO IMPLIED AUTHORITY TO ESTABLISH OR RETAIN BRANCHES; THE APPEALED DECISIONS DISREGARD SUPREME COURT AUTHORITY AND RAISE A CONFLICT AMONG THE CIRCUITS

Branching is not an area about which Congress has been indifferent. Extensive legislative history confirms Congress' intent to place state and national banks on an equal footing. Nor have the courts been indecisive on this issue. Decision after decision reiterates that the purpose of the McFadden Act is to promote competitive equality in branch banking. The conclusion of the Comptroller and the Court of Appeals that an implied power to branch can be inferred from the National Bank Act as a necessary adjunct to Section 30 conflicts with decisions of this Court and thwarts the doctrine of competitive equality.

A. This Court Has Recognized that National Banks Possess No Implied Authority to Branch

In 1924, the Supreme Court, after reviewing the legislative history of the National Bank Act, struck down a decision of the Comptroller allowing a national bank to establish branches, and held that branching authority does not exist by implication:

> The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can

> rightfully exercise only such [powers] as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. . . . [I]t is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. . . . [N]ational banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them.

First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 656, 659, 44 S. Ct. 213, 215-16 (1924). In so holding, the Supreme Court recognized that which the Comptroller ignored and the Court of Appeals has overlooked: Section 30, enacted long before the holding in *St. Louis*, did not imply any branching authority; express authority is required.

Subsequent to *St. Louis*, Congress passed the McFadden Act in 1927, now codified at Section 36. *See First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257-58, 87 S. Ct. 492, 495-96 (1966). The preamble of the McFadden Act could not be more explicit:

> **§ 36. Branch banks**
>
> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> . . . .

Section 36 then proceeds to specify the *narrow* grounds pursuant to which a national bank may retain, establish and operate

branch banks. Congress thus assembled in one section virtually all of the conditions under which national banks could have branches.[13] *Cf. Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J.* (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 ("*First Fidelity*") ("[B]ranching is generally allowed only in the ways the McFadden Act specifies"); *see also* S. REP. No. 473, 69th Cong., 1st Sess. 8 (1926) (Section 36 generally embodies "all of the conditions under which national banks may have branches"). Where Congress perceived the need for additional branches, it enacted express provisions to allow branching in those specific circumstances. *See, e.g.*, 12 U.S.C. § 1823(f) and (k); *see also St. Louis*, 263 U.S. at 658, 44 S. Ct. at 215-16.

Interpreting the McFadden Act in 1929, the United States Attorney General also rejected the argument that national banks have implied authority to retain branches. The question then posed has particular relevance here: May a national bank with two branches lawfully established after 1927, which is consolidating with a state bank having two pre-1927 branches grandfathered under Section 36(a), thereafter retain all four branches? The Attorney General concluded that the consolidated bank could retain only the grandfathered branches, but had no power to retain the two post-1927 branches — even though they were lawfully existing

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[13] The Act, following the introductory clause, specifies the limits of branch retention authority in subsection (a) relating to pre-1927 (grandfathered) branches; in subsection (b)(1) relating to converting state banks; and in subsection (b)(2) relating to the consolidation or merger of banks with existing branches.

up until the moment of the consolidation. 36 Op. Att'y Gen. 116, 121 (1929).[14]

Since the McFadden Act extended branching authority to national banks, the doctrine of competitive equality between state and national banks has been an overarching principle of the National Bank Act's branching provisions. *Logan*, 385 U.S. at 261, 87 S. Ct. at 497. *Logan*, the first case in which this Court interpreted branching power under the McFadden Act, suggested a simple test: If a state bank cannot do it, a national bank cannot do it either. *Id.*, 385 U.S. at 260, 87 S. Ct. at 497 ("As finally passed, the Act permitted national banks to establish outside branches *if* such branches could be established by state banks under state law.") (emphasis added). In *Logan*, this Court refused to construe the National Bank Act to frustrate Congress' clear and longstanding purpose of placing state and national banks on an equal competitive basis in matters of branching. *Id.*, 385 U.S. at 261, 87 S. Ct. at 497.

In *First National Bank in Plant City v. Dickinson*, this Court reiterated that "Congress has deliberately settled upon a policy intended to foster 'competitive equality.' . . . [The McFadden] Act reflects the congressional concern that neither system have advantages over the other in the use of branch banking." *Id.*, 396 U.S. 122, 131, 90 S. Ct. 337, 342 (1969). "Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the

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[14] Congress subsequently amended Section 36 in 1962 to provide express authority for the retention of post-1927 branches following the conversion of a state bank to a national charter, again signalling that express legislation is required to confer branch retention powers. *See First Fidelity*, *supra* p. 18, at 83,987 & 83,999-84,000 n.40.

Comptroller of the Currency." *Id.*, 396 U.S. at 138, 90 S. Ct. at 345.

The Comptroller nonetheless now contends that Section 30, a provision that does not even mention the subject of branching, trumps the subsequent explicit limitations of Section 36. This Court's decision in *St. Louis*, rendered nearly forty years *after* the passage of Section 30, explodes that argument. Indeed, under Section 36(c), the "implication" of authority to branch is directly forbidden; the authority must be either "expressly authorized"[15] or "specifically" and "affirmatively" granted.[16] *See also St. Louis*, 263 U.S. at 656, 659, 44 S. Ct. at 215-16; *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 253, 54 S. Ct. 416, 417 (1934) ("[P]owers not conferred by Congress [to national banks] are denied."). It is not the absence of a Section 36 directive to divest retained branches following a relocation, but rather the *lack* of a Section 36 grant of such retention authority, that governs the outcome of this case.

When Congress wanted to provide for the continued retention of preexisting branches, it had no difficulty making its intention manifestly clear. For example, it did so explicitly in the context of state bank conversions and national bank consolidations in Section 36(b), including those situations where a former main office is subsequently treated as a branch.[17] Therefore, the rule of *expressio unius est exclusio alterius* further refutes the existence of any implied power to retain branches under Sections 30 or 36.

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[15] Section 36(c)(1).

[16] Section 36(c)(2).

[17] Section 36(b)(2)(A).

Cf. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S. Ct. 690, 693 (1974). In addition, Section 81 of the National Bank Act provides that a national bank may operate only at the place identified in its organization certificate and at branches established in accordance with Section 36 — further exposing the fallacy of the Comptroller's argument that Section 30 provides any branching authority.

If, as the Comptroller argues, interstate branching could be accomplished merely through the device of a Section 30 relocation with implied branch retention, the later enactment of Section 36 to create branching authority subject to carefully drawn limits would have been a superfluous congressional gesture. A national bank could, by seriatim relocations, leave a wake of multiple branches regardless of contrary state law.

The Supreme Court has not been misled by such clever attempts to evade state branching laws and has consistently applied the simple test of *Logan*: If a state bank cannot do it, a national bank cannot do it either. As discussed below, because the Comptroller's interpretation is inimical to the purpose of the McFadden Act and to Riegle-Neal, the Court of Appeals erred in deferring to the agency.

B. With Riegle-Neal, Congress has Affirmed the Doctrine of Competitive Equality and the Need for Express Authority to Branch

The rulings below allow the Banks to establish an interstate network overriding Texas' opt-out under Riegle-Neal. The Comptroller contends that Riegle-Neal's grant of limited authority *after* May 31, 1997 to retain branches following a relocation

implies a recognition of *unlimited* authority *until* that date. This argument is refuted by the plain language and legislative history of Sections 30, 36 and the Riegle-Neal amendments.

In 1994, Riegle-Neal specifically created limited branch retention authority in the context of a main office interstate relocation. Congress added a new subsection (c) to Section 30 and a new subsection (e) to Section 36.[18] These provisions, in tandem, authorize a national bank to retain its branches after relocating across state lines, but only where such branches could be established under state law. (The provisions became effective on June 1, 1997.)

Although Riegle-Neal provides for interstate branch banking, the states retain discretion to determine how, when and where banks can operate branches. The Act "does little more than remand to the states the question of interstate branching." Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183, 187 (1996).

The conclusion that Section 36(e)(2) of the Riegle-Neal amendments limits a pre-existing power of national banks to retain interstate branches contrary to state law inaccurately assumes that Riegle-Neal was written on a blank slate. Congress did not purport to suspend the McFadden Act during the hiatus between the enactment of Riegle-Neal and its effective date. Instead, during that period, the McFadden Act, its overriding principle of competitive equality, and the holding in *St. Louis* continued to control branching.

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[18] *See* Riegle-Neal, 108 Stat. at 2349-50.

In essence, the Comptroller urges that Congress intended competitive *inequality* until June 1, 1997. Not one statement during the congressional hearings or the committee conferences lends any credence to this claim. In fact, the legislative history reflects overwhelming congressional support of state autonomy with respect to interstate branching.

> [The bill] strikes the proper balance between creating a more efficient national banking system and protecting States rights and the dual banking system. It respects the interests of States by giving them a long transition time and requiring branches to abide by applicable State laws.

140 CONG. REC. S12787 (daily ed. Sept. 13, 1994) (statement of Sen. Dodd).[19]

The deferral of Riegle-Neal's effective date until June 1, 1997 was designed to allow the *states* sufficient time to consider whether to participate in interstate branch banking — not to afford the Comptroller time to preempt that choice. *See* 140 CONG. REC. H6782 (daily ed. Aug. 4, 1994) (comments of Rep. Castle). It is evident that Congress did not share the Comptroller's belief that he already possessed the unilateral power to implement nationwide interstate branch banking without express authority.[20]

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[19] Moreover, the Conference Report repeatedly affirms the importance of state law in the branching scheme. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994) (Pet. App. L).

[20] The Comptroller and the Fifth Circuit relied on one out-of-context snippet from the Riegle-Neal Conference Report as support that the Conferees "approved" the unqualified retention of interstate branches following a Section 30 relocation during the period between enactment of Riegle-Neal and its effective date. In

Following the enactment of Riegle-Neal, this Court has recognized the continuing vitality of the McFadden Act. *Barnett Bank of Marion County v. Nelson*, __ U.S. __, 116 S. Ct. 1103 (1996). Distinguishing other cases regarding the interpretation of federal banking statutes, Justice Breyer stated that the McFadden Act is a grant of explicit power with an explicit provision that the exercise of that power is subject to state law. *Id.* __ U.S. at __, 116 S. Ct. at 1109 (citing *Plant City* and *Logan*). The decisions below completely ignore this recent affirmation of the policy of competitive equality.

C. The Fifth Circuit has Created a Conflict Among the Circuits

The essential issue presented to the Fifth Circuit was whether the retention of branches must comply with Section 36 (and thus state law) after a main office relocation pursuant to Section 30. The Fifth Circuit's answer creates a conflict with its sister courts.

Three Circuit Courts have looked at simultaneous relocation and branching transactions. The issue was first considered by the Seventh Circuit in *Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969). It determined that the transaction did not involve a *bona fide* main office relocation. *Id.* 124-25. Had the relocation been bona fide, the *Marion* court made

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fact, the Conferees did not intend to alter the balance of federal and state law under the dual banking system. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53 (Aug. 2, 1994). The Report emphasizes the Conferees' expectation that the procedures employed by the Comptroller in permitting main office interstate relocations will include "the application of appropriate State law and authority." *Id.* at 57 (Pet. App. L-19).

it clear that the branching would nevertheless have had to independently satisfy state law under Section 36. *Id.* at 124. The court noted that the branch-back application would only have been permitted if it complied with the state law limitation on the number of banks operating in a city. *Id.*

The Fifth Circuit, prior to the appealed decisions, agreed with *Marion* that the Comptroller should "consider the relationship of the two statutes [§§ 30 and 36] to test the good faith nature of simultaneous applications," since an overall view was necessary to preserve the substance of competitive equality. *See First Nat'l Bank of Southaven v. Camp*, 333 F. Supp. 682, 689 (N.D. Miss. 1971), *aff'd mem.*, 467 F.2d 944 (5th Cir. 1972).

The Third Circuit took the view that state law does not constrain a Section 30 relocation. *Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.), *cert. denied*, 400 U.S. 828, 91 S. Ct. 57 (1970). *Ramapo*, unlike *Marion*, concluded that the main office relocation was not a sham to evade state law. However, the Third Circuit acknowledged *Plant City*'s language that "state law comes into play in deciding how, where, and when branch banks may be operated [since] Congress entrusted to the States the regulation of branching." *Id.* at 346. There, the branching application presented no state law infirmity; as the Court noted, the parties conceded there was no legal objection to the branch-back application itself. *Id.* at 344 n.31.

In dicta, the D.C. Circuit agreed with a decision of the Comptroller to *deny* a bank's application to relocate its main office and retain its former main office as a branch where the branch

could not have been maintained under state law.[21] *Camden Trust Co. v. Gidney*, 301 F.2d 521, 522 (D.C. Cir.), *cert. denied*, 369 U.S. 886, 82 S. Ct. 1158 (1962); *see also Traverse City State Bank v. Empire Nat'l Bank*, 228 F. Supp. 984, 993 (W.D. Mich. 1964) (distinguishing *Camden Trust* on the ground that the branch resulting from the main office relocation in *Camden Trust* violated Section 36(c), whereas the "resulting branch bank" in *Traverse* had "not [even] been challenged").

In refusing to apply Section 36 to the branching aspects of the Banks' applications, the appealed decisions conflict with the holdings in *Marion* and *Southaven*, as well as the dicta in *Camden Trust* and the branching rationale quoted in *Ramapo*. Moreover, although ostensibly relying on the case, the Fifth Circuit has also created a conflict with the Ninth Circuit's decision in *Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 844, 95 S. Ct. 77 (1974).

The Court of Appeals cites *Seattle Trust* as support for the proposition that the Banks may, under Section 36(c), establish their *new* branches in the former host state (at the sites of their former main offices) because they are already "situated" there. However, the record in *Seattle Trust* revealed that the existing Washington branches complied with Section 36(a) and thus were *lawfully* situated in that state. *Seattle Trust*, 492 F.2d at 51. Like the Comptroller, the Fifth Circuit overlooks the crucial fact that there

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[21] This discussion is dicta in *Camden Trust* because the bank's shareholders responded to the Comptroller's denial by chartering a new, separate bank (and not moving the main office of their first bank after all). The D.C. Circuit declined to apply Section 36 to the new bank only because it did not fall within the statutory definition of a "branch."

is no corresponding Section 36 authority here to retain the preexisting branches. *Cf. State of Wash. v. Heimann*, 633 F.2d 886, 889-90 (9th Cir. 1980) (holding that branches established through acquisition must be tested under Section 36(c)); *Mutschler v. Peoples Nat'l Bank of Wash.*, 607 F.2d 274, 278 (9th Cir. 1979) (per curiam) (holding that relocations of existing branches, like the establishment of new branches, are subject to Section 36(c)).

Moreover, Washington state banks possessed the authority to branch in the manner sought by the national bank, and the Ninth Circuit found, in that fact, a compelling demonstration that according similar rights to the national bank would foster competitive equality. The Ninth Circuit left no mistake about its rationale:

> Section 36(c)(1) and (2) . . . must be interpreted in the light of congressional desire to foster a climate of "competitive equality" between national and state banks; *it is not for the courts, in construing the Act, to frustrate that clear congressional purpose.*

Id. at 52 (emphasis added).

Contrary to the rationale in *Seattle Trust*, the Fifth Circuit has upheld the Comptroller's decisions to allow the Banks to do what no other bank can — branch back across state lines in violation of state law. In so holding, the decision of the Court of Appeals conflicts with other Circuit Court decisions — in addition to Supreme Court precedent — while thwarting Congress' objective to maintain competitive equality. *See, e.g., First Nat'l Bank in St. Louis*, 263 U.S. 640, 44 S. Ct. 213; *First Nat'l Bank of Logan*,

385 U.S. 252, 87 S. Ct. 492; *First Nat'l Bank in Plant City*, 396 U.S. 122, 90 S. Ct. 337; *Clarke*, 479 U.S. 388, 107 S. Ct. 750.

II. THE COURT OF APPEALS DECISIONS UNREASONABLY EXTEND THE DOCTRINE OF DEFERENCE, AND ABROGATE THE CONSTITUTIONAL OBLIGATIONS INHERENT IN THE JUDICIAL BRANCH

A. There is No Ambiguity in the National Bank Act Regarding Branching

The holdings below hinge on the erroneous conclusion, under the first prong of *Chevron*, that Congress has not spoken to the issue of branch retention following main office relocation. In reaching this conclusion, the Court failed to examine the language of the National Bank Act as a complete, integrated scheme, and neglected to consider the legislative histories of Section 30, Section 36, and Riegle-Neal. By misapplying the *Chevron* test, the Fifth Circuit impermissibly allowed the Comptroller to usurp both legislative and judicial functions. This Court should grant this petition to ensure that the lower courts do not abandon their constitutionally mandated duty by improvidently deferring to agency misbehavior.

In reviewing an agency's construction of a statute that it administers, a court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781. "[D]eference . . . to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817 (1988). In ascertaining the plain meaning of the statute, the court must look to the particular statutory

language at issue, as well as the language and design of the statute as a whole. *Id.* "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2781-82 n.9. *If and only if* those traditional tools of statutory construction do not reveal Congress' intent, then it is appropriate to consider whether the agency's interpretation is reasonable. *See id.*, 467 U.S. at 842-43 n.9, 104 S. Ct. at 2781-82 n.9; *USAA v. Perry*, 102 F.3d 144, 147 (5th Cir. 1996).

There is no ambiguity in this legislative plan. Although the Comptroller seeks to fragment the National Bank Act, its language as a whole could not be more clear: Section 30 does not mention branching; Section 36 expressly governs branching, but does not authorize it in the circumstances presented here. As Justice Scalia has noted, "[w]ords, like syllables, acquire meaning not in isolation but within their context." *Kmart*, 486 U.S. at 319, 108 S. Ct. at 1832 (Scalia, J., concurring in part and dissenting in part). The National Bank Act constitutes a "complete system" for the government of national banks. *Texas & Pac. Ry. Co.*, 291 U.S. at 253, 54 S. Ct. at 417. It is a strange argument that the silence of Section 30 somehow overrides the express language of Section 36.

Even if the plain language of this legislative scheme were not so readily apparent, the Court of Appeals should have considered the legislative history of the National Bank Act in order to discern congressional intent. Absent such an inquiry, a court cannot fulfill its crucial constitutional role to restrain agency action that violates the intent of Congress. *See* Stephen Breyer, *The 1991*

Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 860-61 (1992).

B. Agencies May Not Resolve Statutory Ambiguities in Violation of Supreme Court Precedent or Usurp Power Expressly Withheld by Congress

Not only has the Comptroller ignored Congress' intent with regard to branch banking, he has also ignored the holdings of this Court vindicating that intent. As discussed above, this Court has held that branching authority cannot be implied. By relying on an implied authority to branch, the Comptroller has undermined the principle of stare decisis — a principle central to a stable and predictable justice system. As this Court has noted, "[O]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131, 110 S. Ct. 2759, 2768 (1990).

Where, as here, an agency supplants a long standing and oft-repeated judicial interpretation of a statute with an interpretation of novel and dubious character, it encroaches upon judicial power in the name of expedience.

> The [agency's] nonacquiescence not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government — the rule of law, the doctrine of separation of powers imbedded in the constitution, and the tenet of judicial supremacy laid down

> in *Marbury v. Madison* . . . . The government expects its citizens to abide by the law — no less is expected of those charged with the duty to faithfully administer the law.

Lopez v. Heckler, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring). *Chevron* deference would not be appropriate even in the face of an ambiguous statute where the agency action so clearly conflicts with Supreme Court precedent.

Of critical importance to the issue of deference, Congress expressly chose to withhold from the Comptroller any power to formulate branching policy through rules or regulations. In the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 708, 94 Stat. 132, 188 (codified at 12 U.S.C. §§ 36 and 93a), Congress prohibited the Comptroller from promulgating any rules under Section 36, preferring that the provisions mean what they say. Deference under *Chevron* to an agency interpretation departing from the language of Section 36 is clearly not warranted since Congress specifically chose *not* to delegate such authority. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S. Ct. 1384, 1390 (1990).

It is unreasonable to assume that Congress would explicitly withhold rule-making authority in the area of branching while simultaneously creating in the agency an unaccountable power to institute new branching policies and procedures through implication. Because the Comptroller's decisions conflict with this Court's precedent and because Congress specifically declined to grant the claimed authority to the Comptroller, the Fifth Circuit's

deference to the agency interpretation abandons the essential tenets of the separation of powers.

C. Because the Comptroller's Interpretation is Unreasonable, It is Not Entitled to Deference

This Court has stated that if it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned, the agency view may be disturbed. *Chevron*, 467 U.S. at 845, 104 S. Ct. at 2783; *see also White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (agency's interpretation that frustrates the legislative scheme is not entitled to deference). The Comptroller's interpretation violates the paramount policy of competitive equality and undermines the opt-out election envisioned by Riegle-Neal; it clearly would not be sanctioned by Congress.

Moreover, "[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263, 115 S. Ct. 810, 817 (1995). The Comptroller's recent reinterpretation of the National Bank Act as allowing retention of interstate branches conflicts sharply with that agency's prior viewpoint, and thus does not merit deference.

For example, the Comptroller's regulations in effect when the Banks' applications were filed directed that "[a] decision on an application [to retain the head office location as a branch in the context of a head-office relocation] will be made in accordance with [12 C.F.R.] §5.30." 12 C.F.R. § 5.40(d)(4) (1995). Section 5.30(a), in turn, stated that the establishment of branches should be

determined in accordance with Section 36, and § 5.30(c)(1) set forth the Comptroller's "policy" to approve branch applications — "*provided* that approval would not violate . . . state law that is incorporated into federal law regarding the establishment of such branches." *Id.* § 5.30(c)(1) (emphasis added).[22]

The Comptroller's present interpretation of branching authority is not long-standing, and was not made concurrently with the enactment of the relevant statutory provisions. Although Section 30 was enacted in 1885, the Comptroller made no public claim of implied authority to retain interstate branches until its decision in *First Fidelity* — more than 100 years later. *See First Fidelity*, *supra* p. 18, at 83,982.

The Comptroller's rationale for the challenged decisions has even mutated throughout this litigation process. Initially, the Comptroller urged that the authority to retain a former main office as a branch was an inherent adjunct of Section 30. In a brief filed in the CNB case, the Comptroller urged that "[W]hen a national bank relocates its main office under section 30, it may continue to operate its existing branches as an implied, but necessary adjunct to the express authority to move the main office."[23] More recently, the Comptroller has recast his argument: He now claims

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[22] Similarly, the Comptroller's current decisions are also at odds with the interpretation of former Comptroller Saxon, who construed Sections 30 and 36 *in pari materia* and opined that a relocation application had been correctly denied where the resulting branching arrangement would offend state law. *See* Saxon Affidavit (Pet. App. N), which was filed in connection with *Traverse City State Bank v. Empire Nat'l Bank*, 228 F. Supp. 984 (W.D. Mich. 1964).

[23] Defendant Comptroller of the Currency's Reply Brief in Support of its Motion to Dismiss or, in the Alternative, For Summary Judgment, and Response to Plaintiff's Cross-Motion for Summary Judgment, at 5.

that because Section 36 does not specifically require divestiture of the preexisting branches, they can be retained. *See* Brief of Appellant Comptroller of the Currency, *Ghiglieri v. Ludwig*, on appeal to the Fifth Circuit.

This Court has signaled that deference to the Comptroller is not appropriate in applying the McFadden Act:

> Nor do these cases [providing that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power Congress explicitly granted"] control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law. See e.g., 12 U.S.C. § 36(c) (McFadden Act) . . .. Not surprisingly, this court has consistently interpreted those explicit provisions to mean what they say.[24]

Barnett Bank of Marion County v. Nelson, ___ U.S. ___, 116 S. Ct. 1103, 1107 (1996).

The Court of Appeals uncritical deference granted to the Comptroller's rationale ignores this Court's admonition in *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46, 93 S. Ct. 1773, 1785 (1973) (citations omitted): "[T]he courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

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[24] In support, the *Barnett* Court cited *Plant City* and *Logan*.

mandate or that frustrate the congressional policy underlying a statute."

Judicial review of administrative agencies is particularly essential when the agency in question has been repeatedly criticized by members of Congress for usurping congressional power and aggressively attempting to preempt state law. "[A] pattern has been established by the Comptroller of the Currency which makes the presumption of deference inoperative. He has displayed a clear disregard for the limits of his authority, for other state and federal regulators and for the Congress." Prepared Statement of Chairman D'Amato before the Financial Institutions Subcommittee (May 1, 1997) (Pet. App. M-3).[25]

CONCLUSION

The National Bank Act does not imply branching authority. That authority resides in Section 36, which applies state law limitations to national banks. The Court of Appeals improvidently deferred to the Comptroller and allowed him to nullify Texas' decision not to permit interstate branch banking — a right Congress granted to the states in Section 36, and continued under Riegle-Neal. The decisions below place state-chartered banks at a competitive disadvantage with the Banks, thereby frustrating the congressional policy of competitive equality and violating the constitutionally mandated separation of powers. For these reasons, the petition for a writ of certiorari should be granted.

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[25] *See also* H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53-54 (Aug. 2, 1994) (noting the conferees' criticism of the Comptroller for failing to appropriately apply certain state banking laws to national banks) (*see, e.g.*, Pet. App. L-13).

Respectfully submitted this 23rd day of December, 1997.

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